141-201

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 319.

SAMUEL C. WINGARD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 27, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1890.

1 In the Court of Claims. Term 1887–1888.

SAMUEL C. WINGARD
vs.
THE UNITED STATES. } No. 15824.

I.—*Petition. Filed Dec.* 1, 1887.

To the Chief Justice and judges of the Court of Claims:

The petition of Samuel C. Wingard respectfully represents that he is a citizen of the United States, and that on the 27th day of February, 1883, he was appointed by the President of the United States, by and with the advice and consent of the Senate, to be associate justice of the supreme court of the Territory of Washington for the term of four years from the above-mentioned date and until his successor should be appointed and qualified, and a commission, bearing date as aforesaid, was issued to him, a copy of which is hereto annexed, marked Exhibit "A," and made a part hereof.

That he duly took the oath of office on the 11th day of May, 1883, and thereupon entered upon, executed, and fulfilled the duties of said office, and was at all times from and after said eleventh day of May, 1883, until the 27th day of February, 1887, ready and willing to execute and fulfil the duties of said office.

That the President of the United States, on or about the 3d day of December, 1885, transmitted to your petitioner a communication purporting to suspend him from said office, which communication was as follows:

2 EXECUTIVE MANSION,
WASHINGTON, D. C., *December 3d*, 1885.

SIR: You are hereby suspended from the office of associate justice of the supreme court of the Territory of Washington, in accordance with the terms of section 1768, Revised Statutes of the United States, and subject to all provisions of law applicable thereto.

(Signed) GROVER CLEVELAND.

To Hon. Samuel C. Wingard, asso. just. of the sup. c't, Territory of Washington, Walla Walla.

Please acknowledge receipt to Dept. of Justice.

Thereupon, on or about said 3d day of December, 1885, the President of the United States issued to one William G. Langford a document setting forth as follows, to wit:

Grover Cleveland, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, by virtue of the authority conferred upon the President by section 1768 of the Revised Statutes of the United States, I do hereby suspend Samuel C. Wingard from the office of associate justice of the supreme court of the Territory of Washing-

ton until the end of the next session of the Senate; and I hereby designate William G. Langford to perform the duties of such suspended officer in the meantime, he being a suitable person therefor, subject to all provisions of law applicable thereto.

3 In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the [SEAL.] third day of December, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the 109th.

(Signed) GROVER CLEVELAND.

By the President:

(Signed) BY THE SECRETARY OF STATE.

That subsequently, to wit, on or about the 11th day of August, 1886, the President of the United States caused to be transmitted to your petitioner a certain other communication, purporting to suspend him from said office, as follows:

EXECUTIVE MANSION,
WASHINGTON, D. C., *August* 11, 1886.

SIR: You are hereby suspended from the office of associate justice of the supreme court of the Territory of Washington, in accordance with the terms of section 1768, Revised Statutes of the United States, and subject to all provisions of law applicable therto.

(Signed) GROVER CLEVELAND.

To Samuel C. Wingard, Walla Walla, Washington Territory.

And on said 11th day of August, 1886, the President
4 issued to said William G. Langford a certain other document as follows:

Grover Cleveland, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, by virtue of the authority conferred upon the President by section 1768 of the Revised Statutes of the United States, I do hereby suspend Samuel C. Wingard from the office of associate justice of the supreme court of the Territory of Washington until the end of the next session of the Senate; and I hereby designate William G. Langford to perform the duties of such suspended officer in the meantime, he being a suitable person therefor, subject to all provisions of law applicable thereto.

In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the [SEAL.] eleventh day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the 110th.

(Signed) GROVER CLEVELAND.

By the President:

(Signed) BY THE SECRETARY OF STATE.

Your petitioner further shows that afterwards a commission, bearing date the 29th day of January, 1887, was issued to said William G. Langford, a copy of which is hereto annexed, marked "Exhibit B."

5 Your petitioner further avers that during the time from the 11th of December, 1885, to the 5th day of August, 1886, and from the 24th day of August, 1886, to the 27th day of February, 1887, said William G. Langford, under and by virtue of said several documents issued to him as aforesaid and without authority of law, performed the duties of said office of associate justice, having first taken the oaths of office required of appointees thereto.

Your petitioner further shows that he has received his salary as said associate justice to and including December 10th, 1885, and from August 5th, 1886, to August 23d, 1886, but the accounting officers of the Treasury Department refuse to pay him any salary for any other period.

Your petitioner therefore claims that there is due him from the United States for salary as aforesaid from the 11th day of December, 1885, to the 5th day of August, 1886, inclusive, $1,964.55, and from the 24th day of August, 1886, to the 27th day of February, 1887, inclusive, $1,543.03, aggregating $3,507.58.

Your petitioner further avers that no action has been had upon this claim or any part thereof by Congress or by any of the departments except as above stated; that he is the sole owner thereof, and no other person has any interest therein; no assignment or transfer of said claim or any part thereof or interest therein has been made; that he has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; that he is justly entitled to the sum of $3,507.58 after allowing all just credits and offsets, and he believes the facts herein set forth are true.

SAMUEL C. WINGARD.

C. H. ARMES,
Solicitor for Petitioner.

6 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

On this 22d day of November, 1887, before me, Geo. T. Thompson, a notary public for Washington Territory, personally came Samuel C. Wingard, who, being by me first duly sworn, says on oath that he is the petitioner named in the foregoing petition; that he has read said petition and knows its contents, and that the facts in said petition stated are true.

SAMUEL C. WINGARD.

Sworn to and subscribed before me the day and year last above written.

GEO. T. THOMPSON.
Notary Public.

[SEAL.]

"EXHIBIT A."

Chester A. Arthur, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, reposing special trust and confidence in the wisdom, uprightness, and learning of Samuel C. Wingard, of Washington Territory, I have nominated, and by and with the advice and consent of the Senate do appoint, him to be associate justice of the supreme court for the Territory of Washington, and do authorize and empower him to execute and fulfil the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Samuel C. Wingard, for the term of four years from the day of the date hereof and until his successor shall be appointed and qualified, subject to the conditions prescribed by law.

7 In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the [SEAL.] twenty-seventh day of February, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and seventh.

CHESTER A. ARTHUR.

By the President:
FRED'K T. FRELINGHUYSEN,
Secretary of State.

"EXHIBIT B."

Grover Cleveland, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, reposing special trust and confidence in the wisdom, uprightness, and learning of William G. Langford, of Washington Territory, I have nominated, and by and with the advice and consent of the Senate do appoint, him to be associate justice of the supreme court for the Territory of Washington, and do authorize and empower him to execute and fulfil the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said William G. Langford, for the term of four years from the day of the date hereof and until his successor shall be appointed and qualified, subject to the conditions prescribed by law.

8 In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the [SEAL.] twenty-ninth day of January, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States of America the one hundred and eleventh.

GROVER CLEVELAND.

By the President:
T. F. BAYARD,
Secretary of State.

II.—*Demurrer. Filed Dec.* 15, 1887.

And now comes the said defendants, by their Attorney General, and, demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

ROBERT A. HOWARD,
Ass't Att'y General.

9 III.—*Demurrer Sustained and Petition Dismissed, December* 19, 1887.

At a Court of Claims held in the city of Washington on the 19th day of December, 1887.

The demurrer to the petition in this case was submitted by Assistant Attorney General Howard for the demurrer, and Mr. C. H. Armes opposed, and it was thereupon ordered that the demurrer be sustained and the petition of the claimant, the said Samuel C. Wingard, be dismissed.

10 IV.—*Application for and Allowance of Appeal.*

SAMUEL C. WINGARD
vs.
THE UNITED STATES. } 15824.

Now comes the petitioner in the above-entitled cause and prays an appeal from the judgment of the court sustaining the demurrer and dismissing the petition herein to the Supreme Court of the United States.

C. H. ARMES,
Attorney for Petitioner.

Filed December 19, 1887.

Allowed in open court Dec. 19, 1887.

WILLIAM A. RICHARDSON,
Chief Justice.

11 In the Court of Claims.

SAMUEL C. WINGARD
vs.
THE UNITED STATES. } No. 15824.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the judgment of the court sustaining the demurrer and dismissing the petition of the application of the claimant for and the allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 23d day of December, A. D. 1887.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Court of Claims. No. 319. Samuel C. Wingard, appellant, *vs.* The United States. Filed January 27, 1888.

Office Supreme Court U. S.
FILED,
MAR 4 1891

BRIEF FOR APPELLANT

IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1890

No. 319

SAMUEL C. WINGARD
Appellant

vs.

THE UNITED STATES

Appeal from the Court of Claims

ROGER S. GREENE

C. H. ~~ARMES~~

Attorneys and of Counsel for Appellant

INGRAHAM & CORYELL, PRINTERS, 214 CHERRY ST., SEATTLE

IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1890

No. 319

SAMUEL C. WINGARD
Appellant

vs.

THE UNITED STATES

Appeal from the Court of Claims

BRIEF FOR APPELLANT

STATEMENT.

Samuel C. Wingard filed his petition in the Court of Claims against the United States who demurred thereto. Judgment was rendered sustaining the demurrer and dis-

missing the cause. The petitioner has appealed to this Court. From the petition the following facts appear:—

The petitioner, appellant, after due appointment by the President and confirmation by the Senate, was on the 27th day of February, 1883, duly commissioned "to be Associate Justice of the Supreme Court for the Territory of Washington . . . . . To have and to hold the said office with all the powers, privileges *and emoluments* to the same of right pertaining, unto him, the said Samuel C. Wingard, *for a term of four years*" from the day of the date of the commission. He duly took the oath of office on the 11th day of May, 1883, and thereupon entered upon, executed and fulfilled the duties of said office, and at all times from and after that day until the 27th day of February, 1887, was ready and willing to execute and fulfill the duties of his said office.

On the 3d day of December, 1885, the President sent to Judge Wingard a communication purporting to suspend him from office and purporting to be "in accordance with the terms of Section 1768 of the Revised Statutes of the United States and subject to all the provisions of law applicable thereto," and on or about the same day issued to William G. Langford a document addressed to him declaring Judge Wingard suspended until the next session of the Senate, and designating Mr. Langford to perform the duties of Judge Wingard in the mean time, "subject to all the provisions of law applicable thereto."

On the 11th day of December, 1885, and thenceforth, to include the 5th day of August, 1886, Mr. Langford,

having first taken the oath required, performed he duties of said office.

The Senatorial session above mentioned and the term of declared suspension of Judge Wingard ended on the 5th day of August, 1886. Afterwards on the 11th day of August, 1886, the President sent to Judge Wingard a second communication precisely similar in all but date and occasion to that to him of 3d December, 1885, and on or about the same day issued to Judge Langford a second document precisely similar in all but date and occasion to that of the 3d of December, 1885, to him. Judge Langford, on the 24th day of August, 1886, having first taken the oath, entered upon the duties of the office, and thenceforth continued to perform them.

On the 29th day of January, 1887, the Senate being still in session, there was issued to Judge Langford by the President a commission precisely similar in form in all respects but names and date to the commission of the 27th day of February, 1883, to Judge Wingard.

From the 11th day of December, 1885, to the 5th day of August, 1886, inclusive, and from the 24th day of August, 1886, to the 27th day of February, 1887, inclusive, Judge Wingard has received no salary, and he is refused by the accounting officers of the Treasury Department pay for any part of either of those periods. He claims that he alone was entitled to said office during all of both periods, and that there is due him as salary for the former period the sum of $1964.55, and as salary for the latter period the sum of $1543.03, aggregating $3507.58. He contends also, and as an independent pro-

position, that the President had no power to suspend him and that consequently he is entitled to all salary down to the date of the commission issued to Judge Langford on the 29th day of January, 1887, namely: the sum of $3257.58. He further claims, and as another independent and an alternative proposition, that from the date of Judge Langford's commission, the 29th day of January, 1887, to the 27th day of February, 1887, inclusive, he is entitled to salary amounting to $250.00.

POINTS AND AUTHORITIES.

I.

The sole authority of the President to suspend civil officers is derived from Section 2 of the Civil Tenure Act of 2nd March, 1867, (14 Statutes, page 430) incorporated in the Revised Statutes as Section 1768. But that Section did not authorize him to suspend the petitioner, for the Section was never intended to apply to territorial officers.

1. The President's power to appoint an Associate Justice of the Supreme Court of Washington Territory, being a statutory power to appoint for a term of "four years" (Act of 2nd March, 1853, Section 9, 10 Statutes 175; Revised Statutes, Section 1864; Act of 4th July, 1884, Sections 9 and 10, 23 Statutes, page 102), without provision for removal or suspension, he had no power to remove or suspend unless subsequently conferred.

Marbury vs. Madison, 1 Cranch, 137.

Ex parte Hennen, 13 Peters, 230.

United States vs. Guthrie, 17 Howard, 284,

per Mr. Justice McLean.

United States vs. Avery, Deady, 204.

United States vs. Perkins, 116 U. S., 483.

2. Section 1763 of the Revised Statutes is general legislation, and according to a well settled rule of construction cannot be held to repeal specific legislative provision

for the particular case of territorial officers or a particular kind of officer of a particular territory, because the intent to do so is not clear.

Gregory's Case, 6 Coke's Reports, 19 b.

Brown vs. County Commissioners, 21 Penn. State, 37.

State v. The Mayor &c., 14 Ohio State, 472.

By the Organic Act of Washington Territory, Section 9, (10 Statutes, 175) it is provided that "The Supreme Court shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum and who shall hold a term at the seat of government of said Territory annually, and they shall hold their offices during the period of four years and until their successor shall be appointed and qualified". On the 4th of July, 1884, the Supreme Court was reorganized and the office of an additional Associate Justice created, of whom it was enacted, he "shall hold his office for the term of four years and until his successor is appointed and qualified" (Act of the 4th of July, 1884, Section 10, 23 Statutes 101). As regards the other officers of the Territory appointed by the President, namely: the Governor, Secretary, United States Attorney and United States Marshal, it is enacted that they respectively shall hold office "for four years" "unless sooner removed by the President of the United States" (Act of 2nd March, 1853, Sections 2, 3 and 10, 10 Statutes, 173 and 175).

This legislation was not only specific but in pursuance of a thoroughly definite, well digested and settled special policy of the United States regarding the inde-

pendent character of the terms of office of territorial judges. Since the date of national independence there have been organized by Congress twenty-nine territorial governments, exclusive of the District of Columbia. In all of the earlier territories except Florida the judges were appointed by the President and they were to hold during good behavior or for an absolute term of years, except in Missouri and Arkansas alone (which originally constituted a single Territory), where they were appointed for four years "unless sooner removed". But according to every territorial Organic Act since 1819 the judges, except those of Wyoming for whose removal consent of the Senate is requisite, have been appointed for an absolute term, while throughout our entire national history all other territorial officers appointed by the President have been and are for a term "unless sooner removed" or "revoked".

The following list exhibits the terms of judges and the Organic Acts for all the Territories:—

Northwest of Ohio: "During good behavior".

Ordinance of 1787. 1 Statutes, 51. Note.

Mississippi. "During good behavior".

Act 7 April, 1798. Sec. 3, 1 Statutes, 550.

Act 29 March, 1804. Sec. 1, 2 Statutes, 301.

Act 2 March, 1810. Section 2, 2 Statutes, 564.

South of Ohio. "During good behavior".

Act 26 May, 1790. Sec. 1, 1 Statutes, 123.

Indiana. "During good behavior".

Act 7 May, 1800. Sec. 3, 2 Statutes, 59.

Orleans. "Four years", absolute.

Act 26 March; 1804. Sec. 5, 2 tatutes, 284.

Louisiana. (District). "During good behavior".

Act 26 March, 1804. Sec. 12, 2 Statutes, 287.

Michigan. "During good behavior".

Act 11 January, 1805. Sec. 3, 2 Statutes, 309.

Act 30 January, 1823. Sec. 1, 3 Statutes, 722.

Illinois. "During good behavior".

Act 3 February, 1809. Sec. 3, 2 Statutes, 515.

Missouri. Four years "unless sooner removed"

Act 4 June, 1812. Sec. 10, 2 Statutes, 746.

Act 27 January, 1814. Sec. 1, 3 Statutes, 95.

Alabama. "During good behavior".

Act 3 March, 1817. Secs. 2 and 3, 3 Statutes, 372.

Arkansas. "Four years unless sooner removed".

Act 2 March, 1819. Sec. 7, 3 Statutes, 495.

Florida. (Judges not appointed by President).

Act 30 March, 1822. Sec. 6, 3 Statutes, 656.

Act 26 May, 1824. Sec. 1, 4 Statutes, 45.

Act 21 January, 1829. Sec. 4, 4 Statutes, 333.

Wisconsin. "During good behavior".

Act 20 April, 1836. Sec. 9, 5 Statutes, 13.

Iowa. "Four years", absolute.

Act 12 June 1838. Sec. 9, 5 Statutes, 237-38.

Oregon. "Four years", absolute.

Act 14 August, 1848. Sec. 9, 9 Statutes, 326.

Minnesota. "Four years", absolute.

Act 3 March, 1849. Sec. 9, 9 Statutes, 406.

Utah. "Four years", absolute.

Act 9 September, 1850. Sec. 9, 9 Statutes, 455

Act 25 June, 1888. Sec. 2, 25 Statutes, 204.

New Mexico. "Four years", absolute.

Act 9 September, 1850. Sec. 10, 9 Statutes, 449.

Washington. "Four years", absolute.

Act 2 March, 1853. Sec. 9, 10 Statutes, 175.

Act 4 July, 1884. Sec. 10, 23 Statutes, 102.

Nebraska. "Four years", absolute.

Act 30 May, 1854. Sec. 9, 10 Statutes, 280.

Kansas. "Four years", absolute.

Act 30 May, 1854. Sec. 27, 10 Statutes, 286.

Colorado. "Four years", absolute.

Act 28 February, 1861. Sec. 9, 12 Statutes, 174.

Nevada. "Four years", absolute.

Act 2, March, 1861. Sec. 9, 12 Statutes, 212.

Act 2 March, 1863. Sec. 3, 12 Statutes, 700.

Dakota. "Four years", absolute.

Act 2 March, 1861. Sec. 9, 12 Statutes, 241.

Act 4 July, 1884, Sec. 2, 23 Statutes, 101.

Act 9 August, 1888. Sec. 2, 25 Statutes, 398.

Arizona. "Four years", absolute.

Act 24 February, 1863. Sec. 2, 12 Statutes, 665.

Idaho. "Four years", absolute.

Act 3 March, 1863. Sec. 9, 12 Statutes, 811.

Montana. "Four years", absolute.

Act 26 May, 1864. Sec. 9, 13 Statutes, 88.

Act 10 July, 1886. Sec. 1, 24 Statutes, 138.

Wyoming. "Four years" "unless sooner removed by the President with the consent of the Senate of the United States."

Act 25 July, 1868. Sec. 9, 15 Statutes, 178.

Alaska. "Four years", absolute.

Act 17 May, 1884. Sec. 9, 23 Statutes, 26.

The acts subsequent to the Civil Tenure Act, which are above noted in case of the Territories of Washington, Dakota, Montana and Utah respectively, are all Statutes providing additional judges for those Territories, and in case of each such judge, expressly provide his term to be "four years" absolute. Hence we contend that the policy of our government respecting the terms of territorial judges extends from early in our national history down past the Civil Tenure Act of 1867 into the Organic Act of Wyoming (1868) and that of Alaska (1884), into the Act of 1884 bestowing additional judges on the Courts of Dakota and Washington respectively, into that of 1886 giving an additional judge to Montana, into the Act of 25 January, 1888, adding judges to Utah, and into that of 9 August, 1888, adding two more judges to Dakota.

In the face of this uninterrupted stream of consistent legislation, it seems impossible to think that Congress intended, by its language in the Civil Tenure act, a departure from its traditional, industrious and persistent policy, invariable for the last seventy years, of political independence for territorial judges.

3. To give to the language of 1768 such force as to authorize the suspension or removal of territorial judges is directly in the teeth of the very aim and spirit of the Civil Tenure Act itself. That Act was intended to, and if constitutional does, restrict the power of the Executive, and it therefore ought not to be construed to extend it.

II.

If the suspensory provision of Section 1768 is to be held applicable to a territorial officer like Judge Wingard, then the exception contained in the section applies also to him, and contrariwise *vice versa*.

1. The Section is one breath. It must be construed consistently. If Judge Wingard was a "civil officer of the United States" (*United States vs. Morris*, 2 Marshall, 96), he was a Judge of the United States, for the only civil office he held was his judgeship; but how he could be a "Judge" of the United States and not be, so far forth as he was such a Judge, one of the "Judges of the Courts of the United States" is not easy, logically, to see.

2. If on the other hand, the words "Courts of the United States" mean constitutional courts only, then the words "any civil officer appointed by the President by and with the consent of the Senate" must mean any civil officer whom the President, by authority of the Constitution, in distinction from authority of Statute, so appoints.

3. Inasmuch as under the Constitution every judge of any court therein mentioned is by that instrument secured in his office against removal or suspension by the President, the exception in Section 1768 can have no operative force unless it apply to other judges created by Federal authority, namely: judges in the Territories.

4. In the legislation of Congress the meaning of the phrase "United States courts" or "courts of the United States" as inclusive or exclusive of the courts created by

the Organic Acts of Territories, is not uniform and is in each Statute to be determined by the context of the phrase and the aim and relations of the Statute.

Yet Congress has always regarded the judicial administration, whether in States or Territories, by courts of its creation as an administration by courts of the United States. In this view, it has extended administration by Federal circuit and district courts over territorial area and that by territorial courts over the state area, classed its federal and territorial judges together, and distinguished between its territorial judges and persons acting under authority of the territory, and has called territorial courts "courts of the United States".

By the Judiciary Act of 1801 "the territory of the United States northwest of the Ohio and the Indiana Territory" were constituted one of the judicial districts of the United States (Act 13 February, 1801, Section 4, (2 Statutes, 90), "to be called the District of Ohio", which was assigned to the Sixth Circuit (*Idem*, Section 6) with Circuit Court to be held at Cincinnati. By Section 24 of the Act of 30 June, 1834, (4 Statutes, 733) a large part of what is known as Indian Territory was annexed to Arkansas Territory for judicial purposes, and afterwards by Section 1 of the Act of 17 June, 1844, (5 Statutes, 680) judicial jurisdiction over that region was given to the District Court of the United States for the District of Arkansas. By Section 2 of the Act of 3 March, 1863, (12 Statutes, 761) the federal jurisdiction over El Paso County, Texas, is assigned to the Territorial District Court of New Mexico. By the Act of 27 July, 1868, Sec-

tion 7 (15 Statutes, 240), jurisdiction over violations of the laws of the United States in Alaska is vested indiscriminately in the District Courts of the United States in California and Oregon and the District Courts of Washington Territory. By the Act of 18 December, 1812, (2 Statutes, 788) all district and territorial judges of the United States are expressly classed together as "judges appointed under authority of the United States". By the Act of 24 February, 1815, (3 Statutes, 213) "persons acting under the authority and appointment of the Territory of Indiana" are expressly excluded from being associated with judges of the general court of Indiana Territory. In Section 1 of the Act of 17 June, 1834 (5 Statutes, 680) Congress calls the Courts of the Territory of Arkansas "the courts of the United States for said Territory before the same became a State".

Compare with the Statutes the adjudged cases, which are as follows :—

United States Insurance Company vs. Canter, 1 Peter, 511.

Wherein it is held that a court created by territorial legislation of Florida was not a "United States court".

Hunt vs. Palao, 4 Howard, 589. Wherein it is held that the territorial Supreme Court of Florida was a "United States court".

Benner vs. Porter, 9 Howard, 235. Holding that certain territorial courts created by Congress were courts of the general government.

Clinton vs. Englebrecht, 13 Wallace, 434. Wherein

it is held that the phrase "courts and marshals of the United States" as occurring in the judiciary Act of 1789 cannot, without violence to the manifest intent of that Act, be applied to include any territorial courts so as to affect the practice in such courts.

Hornbuckle vs. Toombs, 18 Wallace, 648. Wherein the doctrine of Clinton vs. Englebrecht as to practice in territorial courts is affirmed.

Good vs. Martin, 95 U. S., 90. Wherein it is held that the phrase "courts of the United States" occurring in Section 858 of the Revised Statutes was not intended to operate so as to control territorial legislation as to the right of parties in interest to testify. And in *Reynolds vs. United States*, 98 U. S., 145, and *Miles vs. United States*, 103 U. S., 304, the general doctrine of *Clinton vs. Englebrecht*, *Hornbuckle vs. Toombs* and *Good vs. Martin* is reaffirmed.

The effect of all the cases is to affirm that territorial courts, created by Act of Congress and having jurisdiction of cases arising under the Constitution and Laws of the United States, are in a true sense United States courts, and yet to hold that general legislation respecting United States courts, and especially where plainly inapplicable, will not be construed to affect territorial courts in matters of practice, respecting which Congress has in its particular legislation regarding the territories manifested a disposition to confide to the territorial legislatures the regulation of such practice.

Both the territorial and United States functions are

exercised by territorial courts such as are created by the Organic Acts. Those courts are created and defined by the United States through Congress; those for the Territory of Washington are supervised by the United States through its Supreme Court as to all final decisions involving questions arising under the Constitution or Laws of the United States and those for all Territories are thus supervised as to final decisions involving a money value exceeding a specific amount. (*Snow vs. United States*, 118 U. S., 346 to 349, Revised Statutes, Secs. 702, 1911.) They are presided over and attended by officers of the United States, and they have all the jurisdiction of the District and Circuit Courts of the United States, and perform within the territories the same functions and reasonably require, at least so far forth as those functions are concerned, the same independence of the Executive. At the same time, such courts have the same relation to local affairs and to the legislatures of the territories as state courts bear to local affairs and the legislatures of the states. They therefore present two opposite sides or poles of being. On the one hand, so far forth as they are organically related to the territorial legislature, they are in a sense not United States courts, but simply courts of the territory; but on the other hand, so far forth as they are related organically to Congress and the national Executive and federal affairs, they are United States courts, or in other words, functionaries of the United States,—not only creatures of the United States, but sent by the United States to administer and enforce over the territorial area not

merely local law but all that volume of law which elsewhere throughout the whole country is committed exclusively to the constitutional courts of the United States. The Civil Tenure Act, if it touches these territorial courts at all, touches on the United States side or pole, and in that Act at least, if no where else, the phrase "courts of the United States", if to have any territorial application, should be understood to include them.

III.

Even if the President had power both to suspend and to remove, there would still be a question as to what was effected by the commission to Judge Langford: for—

1. At the time the commission issued there were three offices of Associate Justice of the Supreme Court of Washington Territory (Act 4 July, 1884, *supra*). The commission does not designate which office the appointee is to fill. It is therefore void for uncertainty so far forth as conferring office is concerned, unless a vacancy then existed.

A vacancy should be presumed to exist on the principel that the commission *magis valeat quam pereat*. But the vacancy was certainly not in the office of Judge Wingard; for he was only suspended. Whether then we consider the commission as conferring an office or not, it ended the suspension of Judge Wingard. For if it bestowed an office it bestowed another than his, and if it did not bestow an office it expressed the will of the President and Senate that Judge Langford should no longer perform the duties of the suspended officer.

IV.

The question as to the power of the President to remove and that as to his power to suspend are distinct, and the amount of Judge Wingard's recovery may depend on the distinction.

His salary is fixed by Statute at $3000.00 per annum.

Act 17 June, 1870, 16 Statutes, 152.

Revised Statutes, Section 1879.

1. If by Section 1768 the President was not empowered to suspend a territorial judge whom he had appointed, but still had power to remove and did effect the removal by the commission of January 27, 1887, then Judge Wingard is entitled to his unpaid salary down to the day of removal, amounting to $3257.58.

2. If the President had power to suspend, but did not by the commission effect the removal but only ended the suspension, then Judge Wingard is entitled to salary from the date of the commission to the end of his four years term, namely : $250.00.

3. If the President was concluded by the "term of four years" and therefore had power neither to remove nor suspend, then Judge Wingard is entitled to his entire salary withheld, namely : $3507.58.

V.

Judge Wingard's right to his office being apparent his right to recover his salary in this proceeding is clear.

Perkins vs United States, 116 U. S., 483.

VI.

Judgment should be given in this cause in accordance with the foregoing views.

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